Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1026

FEDERATED PUBLICATIONS, INC., d/b/a THE STATE JOURNAL,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Federated Publications, Inc., d/b/a The State Journal, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this action on November 10, 1976.

OPINIONS BELOW

The Opinion of the Court of Appeals, reported at F.2d , is reproduced in the Appendix hereto. The Decision and Order of the National Labor Relations Board and the Administrative Law Judge reported at 218 NLRB No. 20 are also reproduced in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on November 11, 1976, and this Petition is filed within 90 days thereof. This Court's jurisdiction is invoked under 28 U.S.C. Section 1245(1).

QUESTION PRESENTED

May *NLRB v. Gissel Packing Company*, be extended to a case in which ambiguous dual-purpose representation cards have been substituted for a representation election and the employer's conduct has not precluded a fair election.

STATUTE INVOLVED

NATIONAL LABOR RELATIONS ACT, as amended 29 U.S.C., Section 151 *et seq.*

Section 152(3)

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

Sections 158(a)(1); 158(a)(3)

It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; *Provided*, that nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in Section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment on the effective date of such agreement, whichever is later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement; . . .

Section 159(a)

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in

such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: . . .

STATEMENT OF THE CASE

Petitioner, Federated Publications, Inc., d/b/a The State Journal (hereinafter called The State Journal) is a newspaper of general circulation published in Lansing, Michigan. Employees of The State Journal are represented by five unions including Local No. 580 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter called the Union) which has represented full-time truck drivers who take part in the delivery of The State Journal Newspaper. The paper has also been delivered by "Contract Haulers" who since 1963 have delivered The State Journal under independent contracts.

As of April 1974 Contract Haulers, operating under written contracts, delivered the newspaper bundles to predesignated distribution points. Contract Haulers paid their own expenses, hired their own substitute drivers and were substantially independent of the State Journal. Each acknowledged in the written contract that he was an independent contractor (A-10-11).

Prior to April 11, 1974 the Contract Haulers had contacted the Union concerning representation. At a meeting with Union representatives eleven of the Contract Haulers signed authorization cards. Each card stated the signer "hereby authorize Local Union No. 580 to represent me and, in my behalf, *to hold elections*, negotiate all agreements as to hours of labor, wages and other employment conditions." (Emphasis added) (A-23, footnote 23) Later two more of the Contract Haulers signed identical cards. On April 11, 1974 the contracts of all the Contract Haulers were terminated by The State Journal. On April 15 The State Journal received a demand for

recognition from the Union on behalf of the Contract Haulers. It declined, taking the position that the Contract Haulers were independent contractors, not employees within the meaning of the Act. The Union filed a representation petition requesting an election and a refusal to bargain charge with the National Labor Relations Board. On June 19, 1974, the Regional Director, Region 7, issued a Complaint on the refusal to bargain charge. On July 1, 1974 The State Journal, preserving its argument that the Haulers were independent contractors, reinstated the Haulers to their former positions. On July 23, 1974, the first day of hearings, the General Counsel of the National Labor Relations Board amended the Complaint to request, as an additional proposed remedy, an order requiring The State Journal to bargain with the Union without the holding of a representation election for the Contract Haulers.

The Administrative Law Judge found that the Haulers were not independent contractors but employees; that the termination of their contracts on April 11 therefore constituted a discharge; and that the discharges were in an effort to thwart their union activities. His proposed order included the requirement The State Journal bargain with the Union without an election. He found that the appropriate bargaining unit consisted of the twenty-one regular Haulers and left open the question as to whether substitute drivers should be included in the unit.

The Board affirmed the Administrative Law Judge but specifically included four of the substitute drivers in the bargaining unit, bringing the total unit to twenty-five only 13 of whom had signed union cards. It gave no reason for not including other substitute drivers. Pursuant to 29 U.S.C. Section 160(e), the Board petitioned for enforcement in the Sixth Circuit Court of Appeals. The Court of Appeals granted enforcement in a *per curiam* decision.

REASONS FOR GRANTING THE WRIT

***NLRB v. Gissel Packing Company*, has been improperly extended to a case in which ambiguous dual-purpose cards have been substituted for a representation election and the employer's conduct has not precluded a fair election.**

In *NLRB v. Gissel Packing Company*, 395 U.S. 575 (1969) the Court unanimously held, in part: (1) unambiguous union authorization cards — cards stating on their face that the signer authorizes the Union to represent him for collective bargaining purposes *and not to seek an election* — if obtained from a majority of employees without misrepresentation or coercion, were reliable enough generally to provide a valid alternative to the preferable procedure of a representation election; (2) *unambiguous* authorization cards would be counted unless they were solicited with an assurance that the cards would only be used for an election; (3) a bargaining order is a proper remedy for an employer's rejection of a majority union evidenced by *unambiguous* authorization cards, validly obtained, where the employer at the same time undertook a campaign to undermine the Union's majority and make a fair election unlikely; (4) bargaining orders are appropriate where the employer has committed either pervasive unfair labor practices or less severe unfair labor practices which nevertheless have a tendency to undermine the Union's majority; and (5) there is also a category of minor or less extensive unfair labor practices which do not sustain a bargaining order.

The Court in *Gissel* emphasized that, under any circumstances, a Board Election is preferable to a simple card count:

> "The most commonly traveled route for a union to obtain recognition as the exclusive bargaining representative of an unorganized group of employees is through the Board's election and certification procedures under Section 9(c) (29 U.S.C. Section 159(c)) of the Act; it is also from the Board's point of view the preferred route." (Footnotes omitted) 395 U.S. at 596

That the Union represented a majority of the individuals involved had to be shown by *"convincing evidence of majority support"*. 395 U.S. at 596. (Emphasis added) When majority status is determined by a card count the cards must not refer to an election.

> "The cards used in all four campaigns in Nos. 573 and 691 and in the one drive in No. 585 unambiguously authorized the union to represent the signing employee for collective bargaining purposes; *there was no reference to elections.* Typical of the cards was the one used in the Charleston campaign in Heck's, and it stated in relevant part:
>
> > 'Desiring to become a member of the above Union of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, I hereby make application for admission to membership. I hereby authorize you, your agents or representatives to act for me as collective bargaining agent on all matters pertaining to rates of pay, hours, or any other conditions of employment.' "
>
> *NLRB v. Gissel Packing Company*, 395 U.S. at 583 (footnote No. 4). (Emphasis added)

The requirement that the cards contain no reference to an election is based on the obvious fact that if the cards refer to or emphasize that they will be used to obtain an election employees may sign them thinking that they are only authorizing the Union to conduct an election. The strong possibility exists that employees will misunderstand the import of the cards, and the cards alone therefore do not satisfy the requisite test of "convincing evidence of majority support." This fact was emphasized in the Gissel opinion by the Court's reaffirmation of the so-called Cumberland Shoe Doctrine, based on *Cumberland Shoe Corporation*, 144 NLRB 1268 (1963).

> "Under the Cumberland Shoe Doctrine, if the card itself is unambiguous (i.e., states on its face that the signer authorizes the Union to represent the employee for collective bargaining purposes *and not to seek an election*), it will be counted unless it is proved that that employee was told that the card was to be used *solely* for the purpose of obtaining an election." (First emphasis added, second emphasis in the original) *NLRB v. Gissel Packing Company*, 395 U.S. at 584.

In Gissel the Court specifically reserved the question of whether so-called "dual-purpose cards", that is cards which authorize both an election and representation, could be used to support a bargaining order.

> "We need make no decision as to the conflicting approaches used with regard to dual-purpose cards, for in each of the five organization campaigns in the four cases before us the cards were single-purpose cards stating clearly and unambiguously on their face that the signer designated the union as his representative." 395 U.S. at 606."

> "And we reiterate that nothing we say here indicates our approval of the Cumberland Shoe Rule when applied to ambiguous, dual-purpose cards." 395 U.S. at 609

Here the Board and the Sixth Circuit Court of Appeals have taken a step unauthorized by *Gissel*. They have required The State Journal to bargain with the Union without an election on the basis of a one card majority when the cards used clearly state that the first act the Union is authorized to undertake for the card signer is the holding of an election. Each card stated, in pertinent part:

> ". . . hereby authorize Local Union No. 580 to represent me and, in my behalf, *to hold elections*, negotiate all agreements as to hours of labor, wages and other employment conditions." (Emphasis added) (A-23, footnote 23)

These cards contain no clear unambiguous designation of the Union as the signer's bargaining representative as required by *Gissel*. To the contrary, they emphasized the holding of an election and, secondarily, include representation. There is nothing in the record of this case to indicate that the Contract Haulers who signed these cards did not believe what the cards said — that the Union was being authorized to hold an election before representing them.

The primary purpose of the Act and the Board is to assure that employees have a free choice in selecting their bargaining representative:

> "The Board itself has recognized and continues to do so here, that secret elections are generally the most satisfactory — indeed the preferred — method of ascertaining whether the Union has majority support." *NLRB v. Gissel Packing Company*, 395 U.S. at 603. (Footnote omitted).

Where as here, the employees have not made an unambiguous designation of their bargaining representative, this Court should answer the question it posed but left unanswered in *Gissel* — to what extent, if at all, can these dual-purpose cards be used as a substitute for an election.

In addition other factors in this case further undermine the assumption of the Board and the Sixth Circuit that a clear majority of the Contract Haulers have chosen the Union to be their bargaining representative. The Board included four substitute drivers and twenty-one regular drivers in the appropriate unit. Thirteen of these individuals had signed cards. Thus the Union had a bare one man majority of the dual-purpose cards signed. The validity of such a bare majority, even using unambiguous representation cards, was questioned by Mr. Justice Stewart with whom were Mr. Justice White, Mr. Justice Marshall and Mr. Justice Powell in *Linden Lumber Division, Summer and Company v. NLRB*, 419 U.S. 301 (1974). At

footnote fourteen of Justice Stewart's dissenting opinion he said:

> "I do not attempt to indicate how the Board should specify standards as to what may constitute "convincing evidence." In view of its experience and expertise, the Board is better qualified than we are to undertake the specifics of this task. I do suggest that the support of the bare majority of employees, whether demonstrated by authorization cards, a strike, or a strike vote, would not necessarily constitute convincing evidence. Given the possibility of undue peer pressure or even coercion in personal card solicitation or nonsecret strike votes, a higher level of objective dependability might be obtained by requiring a greater show of support than a bare majority."

Moreover the one vote majority would have disappeared had the Board included any of the other substitute drivers in the unit. No reason was ever given by the Board for including only four of the substitutes. In a footnote to its Decision and Order, the Board reached the bald conclusion that the four substitutes ". . . perform work within the unit of drivers on a regular basis for a sufficient period of time during each week or other appropriate calendar period to demonstrate that they have a substantial and continuing interest in the wages, hours and working conditions of the full-time employees in the unit." (A-4) It said nothing about the other substitute drivers. The Sixth Circuit gave the question even shorter shrift. (A-2)

The Board's unit determination is simply not supported by substantial evidence and was clearly arbitrary and capricious. Both the Administrative Law Judge and the Board found that Messrs. Charles Iverson, Tim McKanna, Leon Rutledge, and Rick Kaiser were regular substitutes (A-4, footnote 3; A-23 footnote 24). Neither the Administrative Law Judge nor the Board, however, stated any specific reasons for finding these four to be regular substitutes while excluding other substitutes who, according to uncontroverted evidence, would appear to

have had similar characteristics or equal characteristics to the four found to be regulars.

For example, the Administrative Law Judge, in including two of the substitute drivers, found that:

> "Tim McKanna was a substitute "almost" every Sunday for driver Robert Linn for a period of 3 years prior to April 11, 1974; and Leon Rutledge was a substitute for driver Charles Norris "pretty much" every weekend (Saturday and Sunday) . . ." (A-23, footnote 24)

The record, however, indicates that both the wife of one driver and the grandson of another possessed attributes equally indicative of their being regular substitutes. She delivered about one-fourth of his route on the average of four times a week for three weeks out of four and something less than four times a week the fourth week of each month (A. 530-33).* Certainly her substituting is at least as regular as the " 'almost' every Sunday" of Tim McKanna or the " 'pretty much' every weekend" of Leon Rutledge. The grandfather, moreover, testified that his grandson helped him *every day* (A. 569).* Even if not deemed to be a regular substitute, he was a regular helper and obviously should have been included in the unit.

The only explanation provided by the Administrative Law Judge for omitting these or the several other substitutes was that "(o)ther substitutes did not possess the attributes of a regular substitute". (A-23, footnote 24) The failure of the Board to disclose its rationale for excluding other substitutes from the unit here clearly runs afoul of this Court's holding in *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438 (1965), that:

> "When the Board so exercises the discretion given to it by Congress, it must "disclose the basis of its order" and "give clear indication that it has exercised the discretion with which Congress has empowered it." (Id. at 443.)

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*Refers to the Appendix in the Sixth Circuit.

Moreover, the failure of the Board to adequately consider the status of all substitutes is more serious here. Had either the wife or grandson been included, the Union's tenuous one vote majority would have evaporated and the evidence of the Union's majority status would not simply be unconvincing, it would be non-existent.

In addition to the ambiguous nature of the cards signed by the Contract Haulers, the narrow majority of those cards obtained by the Union and the failure of the Board and the Circuit Court to adequately consider the unit determination issue, the employer's conduct would not necessarily tend to interfere in the election process. The State Journal treated the Contract Haulers as independent contractors. (A-11, footnote paragraph 3.) The State Journal obviously felt that it had the right to terminate these contracts without liability. It did so on April 11. On April 15 it received a formal demand from the Union for recognition. When it refused to recognize the Union an unfair labor practice and a petition for an election were filed by the Union.

The status of truck drivers as employees or independent contractors has been a question of great difficulty for courts in the past. *Deaton Truck Lines, Inc.*, 143 NLRB No. 124 (1963), enf'd. 337 F.2d 697 (5th Cir. 1964); *Consolidated Freightways*, 144 NLRB No. 36 (1963); *Aetna Freight Lines, Inc. v. NLRB*, 520 F.2d 928 (6th Cir. 1975). While the Board's conclusion that the Contract Haulers are employees is not directly attacked here, when judging the propriety of the State Journal's cancellation of the hauler agreements, facts pointing toward independent contractor status cannot be ignored. Contract Haulers provide their own equipment, pay the cost of upkeep on their vehicles and employ their own substitute drivers. Their income comes from the net of their contract rates less their expenses. They do not wear uniforms, and their trucks are not identified as being from The State Journal.

The State Journal voluntarily and unilaterally reinstated all the Contract Haulers after the General Counsel disputed The State Journal's interpretation of its relationship with the Contract Haulers by issuing a complaint June 19, 1974. This reinstatement was not done under threat of a bargaining order as the General Counsel did not amend the Complaint to request a bargaining order until the first day of the hearings July 23, 1974. The amendment was made over the strenuous objection of The State Journal. Thus the "discharge" which lasted approximately 80 days, can have had little effect on the good relations that the employer has had with this Union and all its other unions.* As the Administrative Law Judge found here: "... it is considered that fair labor relations have been maintained between it (State Journal) and the Union and other unions." While lack of union animus is not controlling, *NLRB v. Mrak Coal Company, Inc.*, 322 F.2d 311 (9th Cir. 1963) it is another factor to consider in judging whether ambiguous union cards can and should take the place of a representation election.

In *Gissel* this Court authorized the Board to issue bargaining orders on the basis of unambiguous representation cards either when the employer has committed pervasive unfair labor practices or less serious unfair labor practices which might, nevertheless, tend to undermine the election process. Here the cards obtained by the Union were highly ambiguous dual-purpose cards which emphasized an election. Moreover the employer's conduct can have had little effect on the holding of a fair election. All drivers were reinstated and any harm they suffered during the short period in 1974 they were off work can be remedied by a back pay order. The Union continues to represent other drivers at the State Journal and continues, as it has in the past, to have good relations with the company. In short, nothing has happened to preclude or even jeopardize the

*Nor did it have an adverse effect on the Union's status, since two of the representation cards were turned in *after* the "discharge".

carrying out of the *preferred* method for determining whether the Contract Haulers wish to be represented by the Union. The Haulers signed cards seeking an election, and they should have one.

The Court should now grant this Petition for Certiorari and announce that where, as here, the cards signed are ambiguous dual-purpose cards, the Board may not issue a bargaining order or may only issue a bargaining order when it has made a finding, absent in the case, based on evidence presented by the General Counsel that the Employer has committed pervasive unfair labor practices which clearly make a fair election impossible. This Court should also give substance to the phrase "convincing evidence of majority support" and require, particularly where dual-purpose cards have been used, that the Union demonstrate more than a bare majority support as suggested by the dissenting opinion in *Linden Lumber*.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review and reverse the judgment of the Court of Appeals for the Sixth Circuit in this case.

Respectfully submitted,

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APPENDIX

ON PETITION TO ENFORCE AN ORDER
OF THE NATIONAL LABOR
RELATIONS BOARD

No. 75-1928

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

FEDERATED PUBLICATIONS, INC. d/b/a THE STATE JOURNAL,
Respondent.

Decided and Filed November 10, 1976.

Before: Phillips, Chief Judge, and Edwards and Peck, Circuit Judges.

Per Curiam. This case is before the court on the application of the National Labor Relations Board for enforcement of its order issued against respondent on June 2, 1975. Reference is made to the decision and order of the Board at 218 N.L.R.B. No. 20 for a recitation of pertinent facts.

The Board held that the newspaper's "contract haulers" were employees rather than independent contractors. We conclude that this holding of the Board is supported by substantial evidence on the record as a whole. *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474 (1951); *Aetna Freight Lines* v. *N.L.R.B.*, 520 F.2d 928, 930 (6th Cir. 1975); *N.L.R.B.* v. *Pepsi Cola Bottling Co.*, 455 F.2d 1134 (6th Cir. 1972); *The*

On Petition to enforce an Order of the National Labor Relations Board

News Journal Company v. *N.L.R.B.*, 447 F.2d 65 (3rd Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972); *Maxwell Company* v. *N.L.R.B.*, 414 F.2d 477, 481 (6th Cir. 1969).

There is also substantial evidence on the record as a whole to support the conclusion of the Board that the Company violated §§8(a)(3) and (1) of the Act by discharging all its "contract haulers" and that a bargaining order is an appropriate remedy. *N.L.R.B.* v. *Gissell Packing Co., Inc.*, 395 U.S. 575 (1969).

The Company contends that the Board's unit determination is without an articulated rationale, and constitutes an abuse of discretion. We conclude that this contention is not supported by the record.

Enforcement granted.

DECISION AND ORDER
DATED JUNE 2, 1975

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION

FEDERATED PUBLICATIONS, INC. d/b/a THE STATE JOURNAL

and

TEAMSTERS LOCAL UNION NO. 580, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, IND.

CASE NO. 7-CA-11073

DECISION AND ORDER

On December 23, 1974, Administrative Law Judge Lowell Goerlich issued the attached Decision in this proceeding. There, after Respondent filed exceptions and a supporting brief, and the General Counsel filed a motion to strike the Respondent's exceptions and a brief in support of the Administrative Law Judge's Decision.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations

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[1] The Respondent's exceptions and brief were timely filed but the brief, which was in excess of 20 pages, contained no subject index nor table of cases as required by Sec. 102.46(j) of the Board's Rules and Regulations. This error was corrected by the Respondent before the General Counsel's motion to strike was received by the Board. Accordingly, the General Counsel's motion to strike the Respondent's brief is denied.

Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the Exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions[3] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[4]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge as modified below and hereby orders that Respondent,

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[2]At fn. 18 of his Decision, the Administrative Law Judge inadvertently omitted the word "direct" from the first sentence of the footnote. This inadvertence is hereby corrected so that the sentence reads "Whether Hickey actually had direct knowledge of the drivers' union activities is not controlling since there is strong circumstantial evidence of discrimination."

[3]As noted by the Administrative Law Judge at fn. 24 of his Decision, four employees, Iverson, McKanna, Ruthledge, and Kaiser, perform work within the unit of drivers on a regular basis for a sufficient period of time during each week or other appropriate calendar period to demonstrate that they have a substantial and continuing interest in the wages, hours, and working conditions of the full-time employees in the unit. Par. 4 of the section of the Administrative Law Judge's Decision entitled "Conclusions of Law" is therefore amended to include these four employees in the appropriate unit as regular part-time drivers or haulers.

[4]In adopting the Administrative Law Judge's recommendation that an affirmative bargaining order issue herein to remedy Respondent's 8(a)(1) and (3) violations, Member Fanning does not rely on *Steel-Fab, Inc.*, 212 NLRB No. 25 (1974). Chairman Murphy and Member Jenkins note that the Administrative Law Judge's reference to *Steel-Fab* relates solely to an assertion of the General Counsel and that the remedy recommended by the Administrative Law Judge is based upon *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969).

Federated Publications, Inc., d/b/a The State Journal, Lansing, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2(b) of the recommended Order:

> "(b) Upon request, recognize and bargain with Teamsters Local Union No. 580, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Ind., as the exclusive collective-bargaining representative of the employees in a unit of all full-time and regular part-time contract drivers, also known as contract haulers, employed by The State Journal at its Lansing, Michigan, place of business, excluding guards and supervisors as defined in the Act, respecting rates of pay, wages, hours, or other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement."

2. Substitute the attached notice for that of the Administrative Law Judge. Dated, Washington, D.C., June 2, 1975.

.....

Betty Southard Murphy, Chairman

.....

John H. Fanning, Member

.....

Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board, after a trial in which all parties were permitted to introduce evidence, found that we discharged Melvin Barrett, Stewart Bently, Norman Carrigan, Lyle Cobb, Charles Cummins, Dennis Goff, Hubert Iverson, R.B. Jenks, Bruce Kilbourn, Dan Lawson, Robert Linn, Ralph Martin, Kevin McNamara, Charles Norris, Kenneth Olmstead, Mark Pluger, Patrick Reilly, Robert Rogers, Leon Simmons, Hubert Stockwell, and Lynn Weismiller unlawfully and that by their discharges we discouraged our employees from engaging in concerted activities and from becoming or remaining members of Teamsters Local No. 580, International Brotherhood of Teamsters Chauffeurs, Warehousemen and Helpers of America, Ind., or any other labor organization.

WE WILL offer the above-named employees their former jobs or, if their jobs no longer exist, substantially equivalent positions without prejudice to their seniority or other rights and privileges.

WE WILL pay them any backpay they have lost because we discharged them, with interest at 6 percent.

WE WILL NOT discharge any employee for the same reasons for which the Board found that we discharged the above-named employees.

WE WILL NOT unlawfully discharge employees for lawfully engaging in union activities or protected concerted activities.

WE WILL NOT discourage concerted activities of our employees by unlawfully discriminating in any manner in respect to their hire and tenure of employment or any term or condition of employment.

WE WILL, upon request, recognize and bargain with Teamsters Local Union No. 580, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Ind., as the exclusive collective-bargaining representative of the employees in a unit of all full-time and regular part-time contract drivers, also known as contract haulers, employed by The State Journal at its Lansing, Michigan, place of business, excluding guards and supervisors as defined in the Act, respecting rates of pay, wages, hours, or other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

All our employees are free to remain, or refrain from becoming or remaining, members of a labor organization.

FEDERATED PUBLICATIONS, INC.
d/b/a THE STATE JOURNAL

.....

(Employer)

Dated ..... **By** .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 500 Book Building, 1249 Washington Boulevard, Detroit, Michigan 48226, Telephone 313—226-3200.

DECISION AND ORDER
DATED DECEMBER 23, 1974

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION

FEDERATED PUBLICATIONS, INC. d/b/a THE STATE JOURNAL

and

TEAMSTERS LOCAL UNION NO. 580, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, IND.

CASE NO. 7-CA-11073

DECISION

LOWELL GOERLICH, Administrative Law Judge: The charge filed by Teamsters Local Union No. 580, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Inc., herein called the Union, on April 15, 1974, was served on Federated Publications, Inc., d/b/a The State Journal,[1] the Respondent herein, on April 16, 1974. A complaint and notice of hearing was issued on June 19, 1974. The complaint charged that the Respondent on April 11, 1974, discriminatorily, in violation of Section 8(a)(3) of the National Labor Relations Act, as amended, herein referred to as the Act, discharged 21 employees.

[1]The name of the Respondent was so corrected at the trial.

Decision and Order dated December 23, 1974

The Respondent filed timely answer denying it had engaged in the unfair labor practices alleged.

The case came on for trial at Mason, Michigan, on July 29 and July 30, 1974, and at Lansing, Michigan, on July 31, 1974, September 11 and September 12, 1974, and October 3, 1974. Each party was afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, to argue orally on the record, to submit proposed findings of fact and conclusions, and to file briefs. All briefs have been carefully considered.

Findings of Fact,[2] Conclusions, and Reasons Therefor

I. The Business of the Respondent

The Respondent is and has been at all times material herein a Delaware corporation.

At all times material herein, Respondent has maintained a place of business at 120 East Lenawee in the city of Lansing, and State of Michigan, herein called the Lansing place of business. Respondent is, and has been at all times material herein, engaged at said place of business in publishing a daily and Sunday newspaper and in related operations.

During the calendar year ending December 31, 1973, Respondent, in the course and conduct of its newspaper

[2]The facts found herein are based on the record as a whole and the observation of the witnesses. The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *N.L.R.B. v. Walton Manufacturing Company & Loganville Pants Co.*, 369 U.S., 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with the testimony of credible witnesses or because it was in and of itself incredible and unworthy of belief. All testimony has been reviewed and weighed in the light of the entire record. No testimony has been pretermitted.

publishing operations, derived a gross revenue in excess of $200,000; held membership in, or subscribed to, various interstate news services, including United Press International and Associated Press; published various nationally syndicated features; advertised various nationally sold products, the revenue for which annually exceeded $50,000; and purchased and caused newsprint, ink, and other goods and materials valued in excess of $50,000 to be transported to its Lansing, Michigan, place of business in interstate commerce directly from States of the United States other than the State of Michigan.

Respondent is now and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. The Labor Organization Involved

The Union is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *The Discharges and Replacements*

First: The Respondent holds similar contracts[3] with 21 persons who are referred to herein as contract drivers or contract

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[3]A typical contract read as follows:

It is hereby agreed as follows:

1. Newspaper agrees to furnish Contractor daily with newspapers for delivery at specific times and at addresses designated upon a manifest accompanying such newspapers and to pay Contractor for such services $117.00 per week or such other sum as may from time to time be agreed upon.

2. Contractor agrees to deliver the newspaper to the addresses designated and if unable to make delivery within a specified time to notify Newspaper of such inability in advance; to provide all necessary delivery

Footnote continued on next page

haulers. For about 2-1/2 hours each day the contract driver drops off newspapers at specified stops on a designated route for distribution by paperboys and others. In this occupation the contract hauler uses his own motor vehicle.

Each day of the week the contract hauler (or his substitute) appears at the Respondent's loading dock at an assigned time to load the newspapers for his route. On arriving at the dock, the driver obtains a manifest from a mailbox. The manifest, prepared by the Respondent, designates the location for the drops, the sequence of the drops, and the number of newspapers to be dropped at each stop. Contract drivers also deliver items for paperboys such as rubber-bands, contest prizes and candy bars, payroll checks for the station-master, mail for the paperboys, and shortage notices. Drivers pick up "Trash, papers that weren't used the day before, covers, the top bundles of papers with odds and ends, scrap paper and the bottoms have a brown

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Footnote continued from preceding page

equipment, pay for the cost of operation thereof and to employ on his own account any other person necessary for the performance of such services.

3. It is mutually agreed that Contractor shall conduct and maintain its services on an independent Contractor basis and that Newspaper exercises no control over Contractor's operation other than specifying time and place of delivery. It is further mutually agreed that Newspaper will incur no liability in connection with the use or operation of Contractor's vehicles or equipment and Contractor agreed to protect and indemnify Newspaper against any such liability.

4. This contract shall continue upon a week to week basis and until terminated by either party.

5. The places to which the said party agrees to deliver THE STATE JOURNALS are Trips 33 & 92 daily. And on Sunday trips 6 & 92 and all intervening points which shall be designated from time to time by said first party.

The language in a contract executed with driver Dennis Goff on February 14, 1974, varied somewhat from that set out above. The termination clause read: "The Company and Hauler agree that either party may terminate this agreement upon (15) days written notice, or such shorter time as may be mutually agreed upon."

wrapping on them, along with the plastic tie that goes round the bundle."

Contract drivers first came into existence as such in 1964. Prior to that date the Respondent carried employees on its payroll who performed the duties of the contract driver. These employees punched a timeclock and were paid on an hourly basis. Social security and income taxes were deducted from their paychecks.[4] Some were furnished company trucks, others used their own vehicles to transport the newspapers. These employees sometimes used substitutes (as do the contract drivers) and paid them themselves. Indeed, some of these employees became contract haulers, after which their work assignments remained unchanged.[5]

In the early part of March 1974, a group of the contract drivers met at contract driver Charles Norris' home. Topics discussed were "[s]uch as waiting times, loading our own inserts, how we were paid, trying to break down our routes and see how each individual was paid, to see how much each one was making as far as profit." The possibility of "getting into the union," was also discussed.

On April 6, 1974, a group of employees again met at the Teamsters Hall at which time the contract drivers present signed union authorization cards.

Several days later Norris was informed by Harry W. Schopp, transportation supervisor, that Richard J. Ferris, circulation director, desired to talk with him. The conversation concerned

[4]This is not true of the contract drivers. Contract drivers handle their own income tax returns.

[5]In fact, one employee used the same vehicle (his own) after he became a contract driver.

"waiting time."[6] Norris expressed his point of view on "waiting time" and Ferris asked him if the "other guys felt the same way." Norris replied that he could not speak for all of them, but some of them did. Ferris commented that "we all had problems and we should be able to work them out and he would like to talk to everybody and work them out."

In the forepart of April 1974, prior to April 11, Frank Whipple, business manager of the Respondent, phoned contract driver Robert Linn at his home. Whipple indicated that the "boys" had held a meeting and he asked Linn whether he knew anything about it. Linn replied that he did not attend the meeting, but he knew the meeting had occurred. Linn also told Whipple that the drivers' "gripe" was waiting for papers and "not getting any pay, for it over a long period of time or maybe not any sometimes."[7]

On April 10, 1974, contract driver Melvin Barrett remarked to Mailing Room Superintendent Louis R. Keller that one of the reasons "the fellows" were talking about joining the Union was the manner in which the mailbags were scattered "all over the dock." Barrett further opined that "they were all going to go union." Keller said he had not heard anything about a union. Barrett replied that he didn't think it was the best thing for the dock to be union, but "everybody was pretty upset that they were being jacked around."[8]

[6]Each contract driver was assigned a time at which he was to report for loading newspapers designated for his route. "Waiting time" was the time which elapsed between the reporting time and the time the driver actually received the newspapers for loading.

[7]Whipple was not called as a witness.

[8]Keller denied that the Union was mentioned during the conversation. Keller's denial is not credited.

On April 11, 1974, the next day, Ferris and five others appeared at the Western Union agency at about 9 p.m., pursuant to an appointment made sometime prior to 6 p.m. Ferris furnished the Western Union agent with the copy for a telegram to be sent to the 21 contract drivers, advising them of the immediate termination of their contracts.[9] Ferris requested that the telegrams be delivered personally to each driver by midnight.[10] The telegrams were dispatched between 10 p.m. and 1:30 a.m. and delivered by taxicab.

During the week prior to Easter (Easter was April 14) a representative of U-Haul Company of Northeast Michigan received a phone call from the Respondent "asking the rates of renting an Econoline." The Respondent wanted over 10 vans "almost immediately" starting "that weekend." U-Haul Company was unable to furnish the vans requested.

Nevertheless, the contract drivers were replaced by employees designated as assistant district managers. Twelve district managers, who supervised the carriers, worked full time. Assistant district managers worked part time 5 days a week, about 20 to 25 hours a week. These employees performed the

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[9]The telegram read:

> A rearrangement of transportation operation has been made in an effort to strengthen our sales and market penetration throughout our circulation area. As a result you are hereby notified that your contract delivery agreement is terminated this date, Thursday, April 11, 1974. The check for your contract services week ending April 13, 1974, and the check for the 7th day termination notice have been mailed to you.
>
> Sincerely yours,
>
> The State Journal, Richard J. Ferris

[10]Ferris told the agent that "he wanted them [the telegrams] to go out by midnight and the reason he wanted them out by midnight was because they wanted each telegram delivered personally to each fellow and if they weren't they were subject to a lawsuit." Ferris was not called for testimony.

same tasks as the contract drivers with the contemplated additional duties (according to Publisher Maurice Hickey) of checking complaints, helping with collections, and distributing sales materials. Apparently these additional duties never materialized.

Publisher Hickey assumed the full responsibility of replacing the contract haulers declaring that it was his idea. Hickey asserted that in November or December 1973, he received a "Go" letter from headquarters emphasizing increased sales power which caused him to consider adding more assistant district managers.[11] According to Hickey, he communicated this idea to his subordinates who "were some what lukewarm to it." However, in light of a fall in subscriptions because of a price increase on March 31, 1974, Hickey said he decided "there wasn't any sense of probably waiting any longer." About a week later[12] Hickey discussed the matter with Ferris and Whipple. It was decided that the new employees would take over on Friday and Saturday. As noted about the U-Haul Company was contacted.

A number of the replacements for the contract drivers were college students,[13] and when college let out in May or June the Respondent "experienced quite a bit of turnover." According to Hickey a combination of the turnover problems and the possibility of the Respondent being held liable for backpay for the discharged contract haulers caused him to reinstate the contract haulers.

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[11]The "Go" letter was not produced at the trial.

[12]Hickey was indefinite concerning the date. He testified, "I suppose it was at the end of the first week in April or the beginning of the second week."

[13]Two of the contract drivers, Kevin McNamara and Dennis Goff, were also students.

No contract drivers were considered for the position of assistant district manager. Hickey explained:

> I thought about that but my opinion was, like I said earlier, the way they had been contracted out I had no disagreement with the way they were doing their job particularly, but my feeling was these people — they were used to doing it a certain way for many, many years.[14] I figured it's hard to teach people different ways to do it. I thought it would be much easier and make more sense to bring some new people in with perhaps a little different, a little better background and perhaps some cases with a sales background, and in the long run we would have been better off that way.

According to Hickey, prior to their employment the replacements had not been familiarized with the routes.

Hickey denied that prior to April 11, 1974, he knew of any union activity on the part of the contract haulers.[15]

The Union's letter dated April 10, 1974, demanding representative status, was received by the Respondent on April 19, 1974. The Respondent had unilaterally increased the contract drivers' remuneration under their contracts on February 3, 1974, and, as noted, on February 13, 1974, the contract was executed between driver Dennis Goff, a student, and the Respondent.

A labor agreement is presently in existence between the Respondent and the Union covering "drivers and paper haulers"; all "part-time drivers" are excluded. The covered

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[14]Student Goff's contract was executed February 13, 1974; student McNamara's contract was executed March 16, 1973.

[15]Neither Ferris nor Whipple was called to corroborate Hickey's testimony.

drivers haul "State Runs." On Sundays the contract drivers "haul the same trip[s]." The union drivers sometimes uses substitutes.

Second: The General Counsel contends that the Respondent's motive for replacing the contract drivers was to thwart and scotch these persons' concerted activities. On the other hand, the Respondent attributes the precipitous replacement of the contract drivers to a "Go" letter and Hickey's resolve to combat subscription loss by hiring assistant district managers. The alleged reasons for the Respondent's action do not have a convincing ring and Hickey's testimony on this subject is considered a fabrication of the whole cloth[16] tailored as a defense to this proceeding.[17] In view of the fact that Hickey's subordinates knew of the concerted activities of the contract drivers, it is highly unlikely that Hickey did not also possess this knowledge. His testimony to the contrary is discredited.[18] Moreover, considering the astuteness shown by Hickey while testifying and the well-known emphasis newspaper publishers place on the prompt delivery of their newspapers, it is in-

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[16]Hickey's demeanor has been considered in reaching this conclusion.

[17]When the reason given for a discharge in false the inference may properly be drawn that there is another motive for the discharge, *Shattuck Denn Mining Corporation (Iron King Branch) v. N.L.R.B.*, 362 F.2d 466, 469-470 (C.A. 9, 1966); *The Great Atlantic and Pacific Tea Co., Inc. v. N.L.R.B.*, 354 F.2d 707, 709 (C.A. 5, 1966); *N.L.R.B. v. Melrose Processing Co.*, 351 F.2d 693, 698 (C.A. 8, 1965).

[18]Whether Hickey actually had knowledge of the drivers' union activities is not controlling since there is strong circumstantial evidence of discrimination. As was said by the Supreme Court in *N.L.R.B. v. Link-Belt Company*, 311 U.S. 584, 602 (1941), "The Board was justified in relying on circumstantial evidence of discrimination and was not required to deny relief because there was no direct evidence that the employer knew these men had joined Amalgamated and was displeased or wanted to make an example of them."

credulous that he should have ordered the hiring of inexperienced assistant managers (some of them college students) and loosed them to distribute papers on routes with which they were not familiar. Indeed, his insistence on the replacement of the drivers was of such immediate import that rather than serve the drivers with the week's notice required by the contract he elected to pay a week's wages in advance for the work not performed. Hence, Hickey was willing to incur an unnecessary loss although his alleged objective was to reduce losses.

Moreover, although Hickey claimed that he sought people with "a little better background and perhaps some cases with a sales background," nevertheless, he incongruously provided only a few days for the recruitment of these employees, a period which seems grossly inadequate to obtain the qualified people he allegedly desired.

These circumstances confirm that the Respondent was bent not only on scotching the drivers' concerted activities at once but also on effecting the replacement of the drivers before the Respondent could have received formal notice of the Union's interest. Indeed, in this respect it is significant that the Union involved was the one with which the Respondent had a contractual relationship covering other drivers. Obviously it is clear that it did not want to deal with this Union as the bargaining agent for the contract drivers, although it is considered that fair labor relations have been maintained between it and the Union and other unions. Nor is lack of union animus, as urged by the Respondent, controlling. In the case of *N.L.R.B. v. Mrak Coal Company, Inc.*, 322 F.2d 311, 313 (C.A. 9, 1963), the court said, "nor can we accept the respondents' theory that proof or lack of proof of prior anti-union animus is *controlling*. Such a rule would automatically always insulate the *first* unfair labor practice charged against an employer . . ." See also *Stoffel Seals Corporation*, 199 NLRB 1084 (1972); *Terry Industries of Virginia, Inc.*, 164 NLRB 872, 874 (1967).

That the Respondent aimed to rid itself of the contract drivers as persons rather than to eliminate their jobs is borne out by the fact that it offered none of them assistant district manager jobs; nor did it interview any of them to ascertain whether they were qualified for these jobs. Indeed, this was true although several of the drivers were students and the Respondent was, at the same time, hiring students as assistant district managers. Hickey's explanation of the reason for the Respondent's failure to consider the drivers for assistant district manager positions is neither plausible nor reasonable.

The inference of discriminatory motivation "is sustained and buttressed by the fact that the [explanation offered by the employer] failed to stand under scrutiny." *N.L.R.B. v. Griggs Equipment, Inc.*, 307 F.2d 275, 278 (C.A. 5, 1962); *N.L.R.B. v. Thomas W. Dant, et al. co-partners d/b/a Dant & Russell, Ltd.*, 207 F.2d 165, 167 (C.A. 9, 1953). The timing of the discharges, upon the genesis of concerted activity, strengthens this inference and strongly supports the conclusion that the real motive of the Respondent was unlawful and discriminatory. As was observed in L.J. "Lee" Folkins, d/b/a Standard Oil Distributors v. N.L.R.B., 500 F.2d 52, 53 (C.A. 9, 1974): "Circumstantial evidence, including the timing of [the] discharge, coupled with [the employer's] apparently fabricated business justifications, is sufficient to support the . . . findings" of discriminatory motivation. Timing, knowledge and unusual actions of the Respondent support this conclusion.

Accordingly, it is found (unless the contract drivers are held not be employees within the meaning of the Act) that the discharges of the 21 contract drivers on April 11, 1974 were in violation of Section 8(a)(3) and (1) of the Act.

B. *The Independent Contractor Question*

"Where the person for whom the services are performed retains the right to control the manner and means by which the result is to be accomplished, the relation is one of employment. On the other hand, where control is reserved only as to the result sought, the relationship is that of independent contractor." *The News-Journal Company*, 180 NLRB 864, 867 (1970), affd. 185 NLRB 158 (1970), enfd. 447 F.2d 65 (C.A. 3, 1971), the case which controls the decision herein, citing *Pure Seal Dairy Co.*, 135 NLRB 76 (1962).

In the *News-Journal Company* case, as in the instant case, the status of contract drivers or haulers was concerned. In each case the contracts were similar. The drivers supplied their own trucks and delivered papers in bundles from the company plant to locations designated by the Company along routes in designated areas. It was expressly agreed that the drivers should have the status of independent contractor. Route territory changes were initiated by the Company, but some changes were made at the request of the driver for his own accommodation. Drivers were required to report to the Company's loading dock at a specified time and required to wait if the edition was late. The driver then loaded his papers and dropped them off at prearranged spots for carrier boys and others.[19] The employer maintained no personal record, as such, on the drivers. Drivers performed tasks other than the delivery of the Company's papers.

Additional *indicia of employee status and employer control* in the instant case are: The Respondent required drivers to submit information similar to an employee application; unilaterally changed the drivers' loading times although it resulted in in-

[19]In the *News-Journal Company* case, drivers were permitted to drop papers out of sequence. This was not true in the instant case.

convenience to them; unilaterally increased gasoline prices without amending the contracts; has changed routes and paid for waiting time without amending the contract; has unilaterally added or changed stops along the routes and drivers have not been compensated when new stops have been added; has changed the manifests at will although drivers were not allowed this privilege except upon approval of the Respondent. In some instances, the Respondent has permitted drivers to exercise seniority when route vacancies occurred. The Respondent demanded an explanation for paper shortages and unilaterally decided whether drivers would be paid for correcting them. In respect to newspaper inserts, the Respondent required the drivers to go to a different part of the Respondent's premises and there load their own inserts on the trucks. The Respondent required drivers to deliver sales contest prizes, mail for carriers, gifts for them, rubberbands, plastic bags, and payroll checks for station managers, all of which duties are not reflected in their contracts. The Respondent instructed the drivers on safety; required drivers to notify the Respondent when papers were delivered late; recorded the time the drivers left the dock and the time they reached their drop off spots; ordered a driver to get rid of an unsatisfactory substitute and removed one itself; procured a driver substitute while a driver was absent with a broken leg; and, over a driver's protest, ordered him to deliver papers to a stationmaster's kitchen because it did not want to lose the stationmaster. The Respondent has required the drivers, on occasion, to leave newspapers at various Lansing public schools for which they receive no extra compensation. The Respondent has required drivers to arouse recipients rather than leave papers outside and to pick up and return trash consisting of unused papers, scrap paper, and wrappings without additional compensation or change in contracts. The Respondent issued a directive that drivers should not bring unauthorized persons, including children, into the dock areas, and that every driver was responsible for closing the rear door of his truck when

he finished loading. A driver used the Respondent's truck to deliver papers to the post office. Where there was a split load, the Respondent did not allow the driver to double load although it was more convenient for him.[20]

The contract drivers had no proprietary interests in the newspapers they delivered nor did they own or control their routes. Their profit opportunities were limited. They could not decide when they would service their assigned routes. Prior to 1963, the Respondent treated the same type of driver as an employee.

Thus, it is clear from the foregoing facts that the Respondent "retains the right to control the manner and means by which the result is to be accomplished" within the meaning of the *News-Journal Company* case, *supra*. Accordingly, it is found that the contract drivers are employees within the meaning of the Act.[21]

C. *The Gissel Aspects*

The General Counsel asserts that the case of *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969), is applicable and that an order should be entered in conformity with *Steel-Fab, Inc.*, 212 NLRB No. 25 (1974). A *Gissel* bargaining order is issued to remedy violations of the Act which have prevented the holding of a free and fair election. The 8(a)(3) violations herein found are sufficient to induce a *Gissel* remedy and it, with the appropriate order, is recommended. *Kirvan Truck Line, Inc.*, 207 NLRB No. 20 (1973).

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[20] A split route is one which runs in different directions from the Company's loading dock. The driver is required to deliver the papers in one direction and then return to the dock to pick up the additional papers and deliver them in the other direction.

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[21] In reaching this conclusion, all citations of the parties have been reviewed, as well as the decision of the Michigan Employment Security Commission.

The General Counsel offered dated, valid,[22] authenticated union authorization cards[23] signed prior to April 11, 1974, by 11 contract drivers and valid undated union authorization cards signed prior to April 11, 1974, by 2 contract drivers whose names appear among the 21 contract drivers on the eligibility list of contract drivers in the appropriate unit.[24] Thus the

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[22] See *McEwen Manufacturing Company*, 172 NLRB 990 (1968); *Levi Strauss & Co.*, 172 NLRB 732 (1968); *N.L.R.B. v. Gissel Packing Co., Inc., supra.*

[23] The card contained the language "hereby authorize Local Union No. 580 to represent me and, in my behalf, to hold elections, negotiate all agreements as to hours of labor, wages and other employment conditions."

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[24] The parties stipulated that the appropriate unit was:

All contract drivers, also known as contract haulers, employed by the State Journal at its Lansing, Michigan place of business, excluding guards and supervisors as defined in the Act.

The Respondent insisted upon the inclusion of the regular substitutes in the appropriate unit in addition to the 21 contract drivers. Charles Iverson was a substitute for driver Hubert Stockwell regularly 1 day a week; Tim McKanna was a substitute "almost" every Sunday for driver Robert Linn for a period of 3 years prior to April 11, 1974; and Leon Rutledge was a substitute for driver Charles Norris "pretty much" every weekend (Saturday and Sunday); Ralph Martin used substitute Rick Kaiser to deliver Sunday newspapers from December 1973 until April 11, 1974; driver Robert Rogers, for the past 1-1/2 years, used fellow driver Mark Pluger as a regular weekend substitute. Pluger is included as an eligible employee on the stipulated eligibility list. Other substitutes did not possess the attributes of a regular substitute. If Iverson, McKanna, Rutledge, and Kaiser were added to the eligibility list, the total eligible employees would be 25. Since the Union possessed 13 valid authorization cards, whether the substitutes are included in the appropriate unit will not affect the remedy recommended herein. Thus, no decision on this point is deemed necessary.

It having been found that the drivers are employees rather than independent contractors, they cannot be supervisors as maintained by the Respondent because their relationship while substituting is with the Respondent as an employer and not with the drivers.

Union had been designated as the representative of the majority of the employees in the appropriate unit.

Conclusions of Law

1. The Union is a labor organization within the meaning of the Act.

2. The Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and it will effectuate the purposes of the Act for jurisdiction to be exercised herein.

3. By unlawfully discharging Melvin Barrett, Stewart Bently, Norman Carrigan, Lyle Cobb, Charles Cummins, Dennis Goff, Hubert Iverson, R.G. Jenks, Bruce Kilbourn, Dan Lawson, Robert Linn, Ralph Martin, Kevin McNamara, Charles Norris, Kenneth Olmstead, Mark Pluger, Patrick Reilly, Robert Rogers, Leon Simmons, Hubert Stockwell, and Lynn Weismiller, employees within the meaning of the Act, on April 11, 1974, the Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act.

4. All contract drivers, also known as contract haulers, employed by the State Journal at its Lansing, Michigan, place of business, excluding guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. The Respondent's violations of Section 8(a)(3) of the Act have created an atmosphere in which a free and fair election cannot take place; a bargaining order is the only appropriate remedy for such misconduct.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

It having been found that the Respondent has engaged in unfair labor practices which have created an atmosphere in which a free and fair election cannot take place and that a bargaining order is the only appropriate remedy for the Respondent's misconduct, it is recommended that a bargaining order be entered.

It having been further found that the Respondent unlawfully discharged Melvin Barrett, Stewart Bently, Norman Carrigan, Lyle Cobb, Charles Cummins, Dennis Goff, Hubert Iverson, R.G. Jenks, Bruce Kilbourn, Dan Lawson, Robert Linn, Ralph Martin, Ralph Martin, Kevin McNamara, Charles Norris, Kenneth Olmstead, Mark Pluger, Patrick Reilly, Robert Rogers, Leon Simmons, Hubert Stockwell, and Lynn Weismiller on April 11, 1974, it is recommended that Respondent remedy such unlawful conduct. It is recommended in accordance with the Board policy[25] that the Respondent offer said employees immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges and make them whole for any loss of earnings that they may have suffered as a result of the discrimination against them by payment to them of a sum of money equal to the amount they would have earned from the date of their discriminatory discharges to the date of an offer of reinstatement, less net earnings during such period to be computed on a quarterly basis in the manner established by the Board in *F.W. Woolworth Company*, 90 NLRB 289 (1950), and including interest at the rate of 6 percent per annum in the manner set forth in *Isis Plumbing & Heating Co.*, 130 NLRB 716 (1962).

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[25] See *The Rushton Company*, 158 NLRB 1730, 1740 (1966).

Accordingly, upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, it is recommended that the Board issue the following:

ORDER [26]

Respondent Federated Publications, Inc., d/b/a The State Journal, Lansing, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from discouraging concerted activities of its employees or membership in Teamsters Local Union No. 580, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Inc., or any other labor organization, by unlawfully discriminatorily discharging any of its employees, or by unlawfully discriminating in any manner in respect to their hire and tenure of employment of any term or condition of employment in violation of Section 8(a)(1) and (3) of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Offer Melvin Barrett, Stewart Bently, Norman Carrigan, Lyle Cobb, Charles Cummins, Dennis Goff, Hubert Iverson, R.G. Jenks, Bruce Kilbourn, Dan Lawson, Robert Linn, Ralph Martin, Kevin McNamara, Charles Norris, Kenneth Olmstead, Mark Pluger, Patrick Reilly, Robert Rogers, Leon Simmons, Hubert Stockwell, and Lynn Weismiller immediate and

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[26] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, discharging if necessary any employees hired to replace them, and make them whole for any loss of pay that they may have suffered by reason of the Respondent's discrimination against them in accordance with the recommendations set forth in the section of this Decision entitled "The Remedy."

(b) Upon request, recognize and bargain with Teamsters Local Union No. 580, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Ind., as the exclusive collective-bargaining representative of the employees in a unit of all contract drivers, also known as contract haulers, employed by the State Journal at its Lansing, Michigan, place of business, excluding guards and supervisors as defined in the Act, respecting rates of pay, wages, hours, or other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(d) Post at its premises at Federated Publications, Inc., d/b/a The State Journal, Lansing, Michigan,

copies of the attached notice marked "Appendix."[27] Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by the Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director of Region 7, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated at Washington, D.C., December 23, 1974.

/s/ LOWELL GOERLICH
Administrative Law Judge

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[27] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

No. 76-1026

FILED
APR 7 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

FEDERATED PUBLICATIONS, INC., D/B/A
THE STATE JOURNAL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is reported at 544 F. 2d 908. The decision and order of the National Labor Relations Board is reported at 218 N.L.R.B. ~~No.~~ 151.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 1976, and the petition for a writ of certiorari was filed on January 26, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a bargaining order was an appropriate remedy for the unfair labor practices found in this case.

2. Whether the Board properly excluded certain part-time employees from a bargaining unit.

3. Whether cards signed by employees authorizing the union to represent them were misleading.

STATUTE INVOLVED

Sections 2(3) and 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 152(3), and 158(a)(1) and (3), are set forth in the petition (Pet. 2-3).

STATEMENT

The National Labor Relations Board found that petitioner, which publishes a newspaper, the State Journal, in Lansing, Michigan, engaged in unfair labor practices in violation of Sections 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (3), by discharging 21 contract haulers[1] because they sought representation by Teamsters Local Union No. 580 (the Union) (Pet. App. A19). In so holding, the Board found that the contract haulers were employees within the meaning of Section 2(3) of the Act, 29 U.S.C. 152(3), rather than independent contractors, as petitioner had urged (Pet. App. A20—A22).

The Board ordered petitioner to reinstate the unlawfully discharged drivers with backpay (Pet. App. A25, A26-A27). In addition, on the basis of its findings that the Union had obtained valid authorization cards from a majority of the haulers in an appropriate unit (Pet. App. A23) and that petitioner's unfair labor practices "have prevented the holding of a free and fair election" (Pet. App. A22), the Board issued a bargaining order requiring petitioner upon request to bargain with the Union as the exclusive representative of the employees in the applicable unit (Pet. App. A22, A25).

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[1]The contract haulers make bulk deliveries from the newspaper plant to various designated carrier drops and substations (Pet. App. A11).

The court of appeals, in a *per curiam* opinion (Pet. App. A1-A2), upheld the Board's decision and granted enforcement of its order pursuant to Section 10(e) of the Act, 29 U.S.C. 160(e). The court concluded that there was substantial evidence on the record as a whole to support the Board's conclusions that the contract haulers were employees rather than independent contractors and therefore protected by the Act, that the company had violated Sections 8(a)(1) and (3) of the Act, and that a bargaining order was an appropriate remedy. It also upheld the Board's determination as to the appropriate bargaining unit.

ARGUMENT

Petitioner's contentions deal primarily with the adequacy of the evidence in this case to support the Board's decision and order, and do not warrant review by this Court.

1. Petitioner does not challenge the Board's determination that the contract drivers were employees (Pet. 12) or that its discharge of these employees immediately after they selected the Union as their bargaining agent (Pet. App. A13-A14) constituted an unfair labor practice. Petitioner contends (Pet. 12-14), however, that a bargaining order was not an appropriate remedy under the standards established by this Court in *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575. *Gissel* approved the practice of issuing a bargaining order to an employer, rather than permitting it to insist on holding of secret ballot elections, if the employer has engaged in practices that have "the tendency to undermine majority strength and impede the election processes * * * where there is also a showing that at one point the union had a majority * * *." 395 U.S. at 614.

Petitioner asserts that, because it acted in the belief that the employees were independent contractors and because it offered to reinstate the employees three months

after discharging them, there is no showing that it had impeded the election process (Pet. 12-13).

Whatever petitioner's assessment of its legal rights may have been, the fact remains that the message communicated to employees was that petitioner was so hostile to dealing with them through a union that it preferred to fire them all, rather than even explore whether they were employees entitled to union representation. Such hostility clearly warranted the Board's conclusion (Pet. App. A22-A24) that petitioner's unfair labor practices had "prevented the holding of a free and fair election" and that a bargaining order was appropriate.[2]

2. Petitioner argues (Pet. 9-12) that the Board arbitrarily excluded two part-time employees from the bargaining unit. This contention raises only an evidentiary issue that does not warrant review by this Court. In any event, the record here amply supports the Board's finding as to the proper composition of the unit.

The test for including part-time employees in a bargaining unit is whether they share a community of interest with full-time employees as shown by "work[ing] at regularly assigned hours a substantial number of hours each week, perform[ing] duties similar to those of full-time employees, and shar[ing] the same supervision, working conditions, wages and fringe benefits." *Westchester Plastics of Ohio, Inc.* v. *National Labor Relations Board*, 401 F. 2d 903, 907-908 (C.A. 6).

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[2]As this Court has observed, "[i]t is for the Board and not the courts * * * to make [the determination that a bargaining order is appropriate], based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity. In fashioning its remedies under the [Act] * * * the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts." *National Labor Relations Board* v. *Gissel Packing Co., supra*, 395 U.S. at 612, n. 32.

The four substitute drivers who were included in the bargaining unit—Iverson, McKanna, Rutledge, and Kaiser—worked regularly in place of a full-time driver one or two days a week (see Pet. App. A23, n. 24). When so employed, they were expected to follow the same detailed delivery instructions from the Company and work the assigned route exactly as would the regular driver. While their compensation was a matter for negotiation with the regular drivers whom they replaced, it was necessarily directly influenced by the regular drivers' rate of pay (A. 274-276, 411-412, 504-505).[3]

The other two part-time employees sought to be included by petitioner (Pet. 11) did not have the same substantial and continuing interest in the wages, hours and working conditions of the full-time employees. One of the two, driver Weismiller's wife, several times a week picked up her husband's papers and delivered "possibly [about] one-fourth of [his] route" before he replaced her and completed the delivery (A. 531). She was paid nothing for her work (A. 533). Driver Cummins' 15-year old grandson, although he regularly accompanied Cummins, only "assisted" him with the deliveries, and was paid one-third of Cummins' pay rate (A. 568-569). These two individuals did not share the same supervision as the four included substitutes, since their primary relationship was with the full-time driver whom they assisted, rather than the Company. Further, they did not share the four substitutes' interest in the rate of compensation to be established by collective bargaining. Cummins' grandson's pay depended on Cummins' apportionment of his pay, and Weismiller's wife received no compensation. Finally, their job responsibilities, since they

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[3]"A." refers to the Appendix to the briefs in the court below, a copy of which has been lodged with this Court.

were only "helpers," were significantly different from those of the four substitutes. They were therefore properly excluded from the bargaining unit.

3. Petitioner contends (Pet. 6-9) that the authorization cards signed by the employees led the employees to believe that they were authorizing only an election, and that therefore the cards should not be used as evidence that the Union was designated as their representative.

This contention was not raised before the Board. Section 10(e) of the Act, 29 U.S.C. 160(e), provides that a court of appeals, acting on a petition by the Board for enforcement of its order, shall not consider any "objection that has not been urged before the Board, its member, agent or agency * * * unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." Petitioner alleges no extraordinary circumstances. The court of appeals therefore could not have considered the contention had petitioner sought to raise it in that court. *National Labor Relations Board* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318, 322; *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. 253, 255-256. *A fortiori*, petitioner should also be precluded from raising the issue for the first time in this Court, as it seeks to do. Indeed, even in the absence of a statute such as Section 10(e), petitioner would normally not be permitted to raise the issue now for the first time, *Neely* v. *Eby Construction Co.*, 386 U.S. 317, 330, particularly since it requires a factual determination that the cards at issue were misleading. See, *e.g.*, *National Labor Relations Board* v. *C. J. Glasgow Co.*, 356 F. 2d 476, 478 (C.A. 2); *Happach* v. *National Labor Relations Board*, 353 F. 2d 629, 631 (C.A. 7).

In any event, petitioner has not shown that the authorization cards were misleading.[4] They did not state that only an election to determine representation was authorized. Rather, they clearly granted authority both to represent and negotiate, in addition to referring broadly to authority to hold "elections."[5]

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[4]Petitioner relies on Mr. Justice Stewart's dissenting opinion in *Linden Lumber Division, Summer & Co.* v. *National Labor Relations Board*, 419 U.S. 301, 310, 314-315, n. 5, for the view that signing of cards by a bare majority of employees in this case should not be taken as evidence that the union is their authorized representative. That case, however, did not involve unfair labor practices that interfered with the conduct of an election, and therefore the language upon which petitioner relies does not address the appropriate use of authorization cards where an election is not a reliable method of determining employee preference.

[5]The cards authorized the union "to represent me and, in my behalf, to hold elections, negotiate all agreements as to hours of labor, wages, and other employment conditions" (Pet. App. A23, n. 23).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1977.

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*The Solicitor General is disqualified in this case.